

THE PACIFIC BANK BHD*a*

v.

VIMTEX SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR

RK NATHAN J

b

[ORIGINATING SUMMONS NO: S2-24-2279-1999]

15 NOVEMBER 2000

LAND LAW: *Charge - Notice of demand - Whether notice was for a sum in excess of that due - Rental proceeds of charged property - Whether taken into account*

c

BANKING: *Securities for advances - Loan secured by way of charge over property - Assignment of rental proceeds - Whether rental proceeds went towards settlement of loan*

d

The defendant secured a loan with the plaintiff bank by way of a charge over its property ('the property'). Pursuant to a deed of assignment of rental proceeds, the defendant assigned all his rights to the rental proceeds of the property to the plaintiff. The defendant defaulted on the loan which brought about the present application by the plaintiff to sell the property by way of public auction. The issue was whether the plaintiff's notice of demand to the defendant was in excess of that due as the plaintiff failed to deduct the rental proceeds of the property.

*e***Held:***f*

[1] Based on the facts, the plaintiff did collect cheques from the tenant but did not credit the cheques received, as it wished to reserve the right to give vacant possession of the property at the public auction. By its own admission, the plaintiff instead held on to those cheques. Further, the plaintiff failed to exhibit the deed of assignment of rental proceeds in any of its affidavits produced in court. As such, the plaintiff had failed to take into account that the payment of rentals by the tenant of the property went towards the settlement of the defendant's loan. In the circumstances, the notice of demand was for a sum in excess of that which was due.

g

[Application dismissed with costs.]

*h**i*

- a* For the plaintiff - Santhirakala Ramasamy; M/s Wang Kuo Shing & Co
For the defendant - M Loganathan; M/s Thangaraj & Assocs
For the receivers and managers (defendant) - G Rajasingam; M/s Shearn Delamore & Co

- b* Reported by Raja Vishnu

JUDGMENT

RK Nathan J:

Facts

- c* This is the plaintiff's application for foreclosure proceeding to sell by public auction the property of the defendant (the property) charged to the plaintiff for a term loan of RM1.12 million. By a sale and purchase agreement dated 7 July 1994 (the 1st S&P agreement), one Kepland Sdn Bhd (Kepland) as
- d* vendor sold the said property to one Chin Wing San (Chin). Subsequently by a 2nd sale and purchase agreement dated 5 September 1995 and by a deed of assignment dated 25 August 1995 and with the consent of Kepland, the said
- e* Chin agreed to sell and transfer all rights over the said property to the defendant herein. Amongst the terms *inter alia* for the said loan were that the defendant was to repay the said loan together with interest in 180 instalments at RM11,511 per instalment and the interest calculated was at a rate of 1.75% per annum above the base lending rate (BLR) at monthly rests. Upon the defendant's default the plaintiff through its solicitors' letter dated 1 April 1998, terminated the loan and demanded repayment of all sums due.
- f* In the said notice of termination the plaintiff also alleged that the defendant had executed on 25 August 1995 a deed of assignment of rental proceeds (assignment of rental proceeds) whereby the defendant had unconditionally and irrevocably assigned absolutely to the plaintiff all of the defendant's rights to the rental proceeds in and under the tenancy agreements executed between the defendant and the tenant in respect of the property and had covenanted to
- g* collect such rental proceeds due and payable under the tenancy, and to repay the same into an account opened and kept by the plaintiff. The plaintiff contended that the defendant had indeed rented out the said property but had failed to pay the amounts of rental collected, to the plaintiff. In response to the last allegation the defendant affirmed an affidavit through its director and exhibited a letter from the plaintiff to the tenant demanding the rentals and
- h* also exhibited numerous payments by the tenant to the plaintiff. The defendant contended that whilst the plaintiff had received numerous cheques from the tenant, the plaintiff had failed to give credit to the defendant towards the loan
- i*

in respect of the rentals received. The plaintiff replied in an affidavit that it had not credited the cheques received from the tenant as it wished to reserve its right to give vacant possession of the property at the public auction. The plaintiff admitted that it still had the cheques from the tenant in its possession and exhibited the same to encl. 14. The cheques total a sum of RM70,000 and not RM50,000 as contended by the plaintiff in encl. 16.

Findings Of The Court

In foreclosure proceedings where the bank intends to exercise its right *in rem* the court must interpret the provisions of the relevant documents strictly. Here the plaintiff had in its own notice of demand referred to the existence of an agreement dated 25 August 1995 between the parties whereby by an assignment of the rental proceeds, the rentals in respect of the said property to be paid by the tenant were to be paid to the plaintiff to be kept by the plaintiff in an account opened for this purpose. The defendant on the other hand states that the amount of the rentals collected was agreed to have been credited towards settlement of the monthly instalments. The plaintiff has filed a total of eight affidavits whereas the defendant has filed only two. Yet in none of the eight affidavits has the plaintiff exhibited this deed of assignment of rental proceeds. The very fact that the plaintiff has failed to do so lends weight to the argument of the defendant that the rentals were to have been taken into account of the total sum due to the plaintiff. The plaintiff on the one hand in its notice of demand stated that the rentals were to be paid to the plaintiff by the tenant to be kept in an account specifically opened for this purpose. The plaintiff had failed to state why this was so. Yet on the other hand the plaintiff states in an affidavit that it had not banked in the cheques from the rentals because it wanted to reserve its right to give vacant possession at the public auction. Surely this reason now given must go against the terms of the deed of assignment of the rental proceeds. The plaintiff's stand makes no sense. Why does the plaintiff want to open a specific account to receive the rentals and not set off the loan or the instalments? No reason has been given by the plaintiff. Another puzzling act of the plaintiff is its admission that it is still holding onto those cheques. Surely the plaintiff ought to have returned those cheques to the tenant and ought to have notified the tenant that the plaintiff was exercising its rights under the loan agreement against the defendant and that the plaintiff would not wish to prejudice its rights by accepting the rentals. Nothing like this was done.

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- a* I am satisfied that the plaintiff has failed to take into account the payment of the rentals by the tenant towards the settlement of the said loan and in the circumstances the notice of demand is for a sum in excess of that which is due. Further the failure of the plaintiff to exhibit the deed of assignment of the rental proceeds which it had specifically relied upon in its notice of demand must be held against the plaintiff. Needless to say the plaintiff's conduct towards the tenant is not consistent with a bank whose main desire ought to be to reduce the loan as much as possible. Having considered all factors I had no hesitation in dismissing this application with costs.
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